

Lee (Migration) [2023] AATA 1821 (9 June 2023)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Hana Lee

REPRESENTATIVE: Mr Dong Chul Jeong (MARN: 9803196)

CASE NUMBER: 1908123

HOME AFFAIRS REFERENCE(S): BCC2016/1747362 BCC2017/2713664
BCC2019/1747362

MEMBER: Kira Raif

DATE: 9 June 2023

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl 820.211(2)(a) of Schedule 2 to the Regulations
- cl 820.221(1)(a) of Schedule 2 to the Regulations
- reg 2.03A

Statement made on 09 June 2023 at 12:33pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – joint bank accounts – Residential Tenancy Agreement – supporting statutory declarations – joint social activities – joint travel – registered relationship – decision under review remitted

LEGISLATION

Acts Interpretation (Registered Relationships) Regulations 2008
Migration Act 1958, ss 5, 65
Migration Regulations 1994, Schedule 2, cls 820.211, 820.221; rr 1.09, 2.03

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

Application for review

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant is a national of Korea, born in March 1985. She applied for the visa on 31 July 2017 on the basis of her relationship with her sponsor. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211 because the delegate was not satisfied the applicant was the de facto partner of the sponsor. The applicant seeks review of the delegate's decision.
3. The applicant was represented in relation to the review. No hearing was held in this case as the Tribunal was able to make a favourable decision on the material before it. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

Relevant law

4. At the time the application was made, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations).
5. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.
6. 'De facto partner' is defined in 5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s 5CB(2).
7. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.09A(3). Each of the specific matters contained in reg 1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties in a de facto relationship?

8. Both the applicant and the sponsor had been in other relationships. They claim to have met in Australia in September 2014 when the applicant was interviewed for a position at the business owned by the sponsor. She was not successful, but they had mutual friends and worked in the same industry, so they met at various functions. They began to date in about September 2015 and moved in together in June 2016.
9. The applicant provided a number of documents with the primary application and a considerable amount of additional evidence is before the Tribunal.

10. When making the application, the applicant stated that she and the sponsor had a joint account and that they are jointly responsible for bills, holidays, and entertainment. The applicant provided with the application bank statements from National Australia Bank (NAB) in the applicant's name dated between November 2016 and August 2017, letters from the NAB to the applicant sent between August 2017 and September 2017, and statements for a joint account held by the parties with Westpac Bank dated between February 2017 and August 2018.
11. The applicant provided to the Tribunal copies of bank accounts for the period from June 2019 to March 2023.
12. The Tribunal is satisfied the applicant and sponsor share household expenses and pool their resources. There is very limited evidence of joint ownership of assets and joint liabilities or of any obligations owed to the other party.
13. In addressing the nature of the household, the applicant and sponsor had provided statements with the primary application in which they claim that they had been residing together since June 2016 and share the household chores. The applicant provided with the application a copy of the joint Residential Tenancy Agreement dated 26 May 2016 for the address at Chatswood, rental receipts, in the sponsor's name dated from June 2016 to July 2017, a tenant ledger report for the parties' joint residence; and individual trust account payment receipts for payments made between May 2016 and February 2019. The applicant also provided to the Tribunal copies of correspondence addressed individually to the applicant and sponsor at the same address including telephone accounts, utility bills, Medicare letter, and Specsavers, for periods between April 2017 and October 2017.
14. The applicant provided to the Tribunal copies of joint tenancy agreements in the names of the applicant and sponsor dated 2019, joint tenancy rent fee ledgers showing rental paid by both parties jointly between May 2016 and August 2021, a letter from Fair Trading regarding their bond jointly paid on 24 August 2022 and telephone bills jointly addressed to the parties dated October 2020. The parties provided copies of utility bills in joint names for the period from March to June 2019. In addition, copies of utility bills addressed to the sponsor at the same address as declared by the applicant were provided for the period between January 2022 and March 2023.
15. Having regard to the above evidence, the Tribunal is satisfied that the applicant and sponsor have established a joint household and that they share the housework.
16. The parties stated in their statements that accompanied the primary application that they share similar interests and spend time bushwalking, travelling, and attending soccer matches. They have dinner with friends and movie nights watching both English and Korean movies. The applicant provided with her application a statement from her father, supporting the relationship, and statutory declarations from supporting witnesses all of whom state that the relationship is genuine. The applicant presented a number of photographs of the parties with each other and with family and friends. These were taken at different occasions, including Christmas, a friends' engagement party, birthday parties and travelling, between 2016 and 2019.
17. The applicant provided additional evidence of joint social activities to the Tribunal. This includes evidence that the parties held joint membership with Fitness First and the R.S.L., recent photographs of the applicant and sponsor with each other and with family members and friends, taken over a period and showing the parties engaging in various social activities and events. The Tribunal has also been provided with copies of the sponsor's tax returns lodged with the Australian Taxation Office (ATO) for the year ending 2021 and 2022 in which he declares the applicant as his partner.

18. The Tribunal is satisfied, having regard to the above, that the parties represent themselves to other people as being in a de facto relationship with each other. The Tribunal is satisfied that friends and acquaintances believe the relationship to be a genuine one. The Tribunal is satisfied the applicant and sponsor plan and undertake joint social activities.
19. The relationship has been in existence for about seven years. In statements to the Department, the applicant and sponsor claimed that they are similar and enjoy discussing their lives with each other, they are passionate about life, travel, and adventure. They rely on each other emotionally and intellectually. The sponsor is no longer able to have children. They plan to travel together to Korea, and Europe. The applicant provided with the application evidence of the couple's travel from Sydney to Ballina in March 2017, as well as evidence of the applicant's and sponsor's travel to Korea in 2018.
20. In her statutory declaration to the Tribunal, the applicant stated they enjoy each other's company and love spending time together, they are committed to each other and want to have a future together. The applicant provided copies of Valentine's Day cards from the sponsor to the applicant, copies of the sponsor's telephone records showing regular communication and the sponsor's superannuation details showing the applicant is a beneficiary of the fund, along with the sponsor's children.
21. The Tribunal is satisfied the applicant and the sponsor view the relationship as a long term one and that they provide each other with companionship and emotional support.
22. Having regard to all the circumstances, the Tribunal is satisfied that the applicant and sponsor have a mutual commitment to shared life to the exclusion of others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied they live together. There is nothing to suggest they are related by family. On the basis of the above the Tribunal is satisfied that the requirements of s 5CB(2) are met at the time the visa application was made and the time of this decision. Therefore the applicant meets cl 820.211(2)(a) and cl 820.221(1)(a).

Are the additional criteria for a de facto relationship met?

23. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in reg 2.03A. Both members of the couple must be at least 18 years old: reg 2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
24. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: reg 2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
25. The applicant has provided evidence that the relationship is registered in NSW in November 2019 as a kind of relationship prescribed in the Acts Interpretation (Registered Relationships) Regulations 2008: reg 2.03A(5). Accordingly, the 12 month requirement does not apply.
26. The Tribunal is satisfied that the applicant meets the additional criteria prescribed in reg 2.03A.

Conclusion

27. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

28. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl 820.211(2)(a) of Schedule 2 to the Regulations; and
- cl 820.221(1)(a) of Schedule 2 to the Regulations
- reg 2.03A

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31. Kira Raif

32. Senior Member